IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 4172/2007

In the matter between

I H L **Plaintiff**

and

A M L **Defendant**

JUDGMENT
Delivered on 29 November 2011

MURUGASEN J

[1] The plaintiff, I H L, instituted an action for divorce against the defendant A M L on the grounds of irretrievable breakdown of the marriage between the parties and there being no reasonable prospect of the restoration of a normal marital relationship between them.

[2] In defending the action the defendant relies on certain practices of and beliefs espoused by the religious institution to which she and the plaintiff belong, her constitutional rights and Section 5 A of the Divorce Act No 70 of 1979. She contends that her marriage to the plaintiff lies for annulment as his previous Christian marriage was not dissolved as a result of the adultery of his then wife, Diana. This constituted a religious impediment to the plaintiff's marriage to her. The defendant claims damages premised on such annulment, and various other patrimonial losses suffered by her during the marriage, and monies allegedly owed to her by the plaintiff and the juristic entities of which he is a member.

[3] It is common cause that the civil marriage between the plaintiff and

Diana was dissolved by a decree of divorce granted in the Brisbane Family Court of Australia on 8 January 1990. There was accordingly no legal bar to the marriage between the parties. It is also common cause that on 27 March 1992 at Hillcrest KwaZulu-Natal, the parties entered into a civil marriage out of community of property with the exclusion of the accrual system and that there were no children born of the marriage between the parties. The parties had also entered into a Christian union in a religious ceremony.

The parties represented themselves in these proceedings. Neither party called any witnesses.

Summary of Background

[4] The acrimonious personal relationship between the parties has manifested itself in numerous applications and counter-applications against each other, which were regularly enrolled for hearing but failed to achieve any finalization. The matters were generally adjourned *sine die*, only to be either re-enrolled or to appear under the guise of an another application or counter application, the main reason therefor being the failure of the parties to place the matters properly before the court, particularly by mulcting applications by irrelevant documentation or failing to provide a sound legal basis for the application.

[5] It is therefore appropriate that this judgment contain a summary of the litigation and a record of the manner in which the parties have conducted themselves in the course of all the litigation.

[6] Only the divorce action was set down for trial from 16 to 20 May 2011. However the pleadings and documents in all the applications and actions between the parties were placed before this court because the defendant in particular persisted with certain applications which, in her view, needed to be heard in tandem with the divorce although these matters were not set down for hearing before this court.

[7] Nevertheless in a concerted endeavor to finalize and dispose of at

least some of the litigation that has rolled on from year to year, increasing in volume and 'cause' with any resolution and resulting in an incomprehensible morass of pleadings, I attempted to introduce some measure of legal credibility deserving of the time and resources demanded by a full scale trial, by first determining and then hearing the issues that lay for ventilation.

[8] The parties were ill prepared; no bundles of documents that the parties intended relying on were ready at the commencement of the hearing, although the parties were aware that the matter was enrolled for trial.

[9] Despite being afforded the opportunity to do so the parties presented the court with unbound and unpaginated bundles of documents, assembled without any cogniscence of their relevance to the issues for determination. During the proceedings legal terminology was frequently utilized without recourse to its meaning or defining principle or relevance to the issues for determination, which demanded forbearance born only of the stoic hope that another court would not be similarly burdened if some degree of resolution could be reached during the proceedings before me.

[10] When the divorce action was set down for hearing in 2010, the late Judge President of this division, having had sight of the unwieldy morass of papers, resorted to assistance from the Durban Justice Centre to lend some order to the documents and to separate them in accordance with the various applications they related to.

[11] This was a difficult exercise given that most pleadings bore the same case number irrespective of the causa and often identical pleadings and /or supporting documentation were filed although purporting to be in respect of an independent application or to refer a different issue for determination.

[12] On the last occasion when the parties were in court prior to the divorce trial, the defendant enrolled on the unopposed motion roll an application for the consolidation of three actions or applications: the first being an action for monies loaned and advanced by the defendant to the plaintiff, the second an

action against a close corporation of which the plaintiff was allegedly the sole member, and the third an appeal against an order of the maintenance court in Empangeni. That application was adjourned as the court had no idea which application was before it and refused to read papers which were not indexed or paginated.

[13] When the matter commenced before this court, the defendant raised as a bar to the divorce trial proceeding, an action which had been launched by the plaintiff consequent to the defendant disputing a consent agreement entered into by the parties on 13 July 2009, in which the plaintiff sought to enforce the consent agreement which was disputed by the defendant although she had appended her signature thereto. It transpired that the proceedings had commenced by way of an application under case number 2668/2010 and thereafter in terms of an order of court dated 22 February 2010, the plaintiff had instituted an action for the same relief.

[14] The file under case number 2668/2010 was drawn from the Registrar's office and a perusal thereof revealed that the file only contained a few formal notices pertaining to the filing of documents. Other pleadings in respect of the action were filed under case no 4172/2007.

[15] However the plaintiff advised the court that he had withdrawn the application and action as he no longer sought the enforcement of the consent agreement between the parties. The notice of withdrawal could not be located nor could the plaintiff himself furnish a copy thereof. The plaintiff then withdrew the action at the hearing. There was no objection to or submissions made by the respondent in respect of the withdrawal of the application and action.

[16] Although the application for consolidation was not before this court, the defendant at that stage persisted that a consideration of the application was necessary and integral to the relief sought in her counterclaim in the divorce action.

[17] In order to introduce a measure of control and consistency into the proceedings and limit the issues for determination, an enquiry in terms of Rule 37 of the Uniform Rules was conducted with the parties.

[18] At the commencement thereof I was furnished with a Rule 37 minute signed by the parties dated at Richards Bay on 11 August 2010, for a Rule 37 conference held at the Ngwelenzane Magistrates Court. Despite her signature thereon, the defendant disputed the validity of the conference on the basis that "it was to late for me to take any action". For the sake of expedience and facilitating progress the court decided that the Rule 37 proceedings should be held afresh.

[19] Prior to the commencement of the Rule 37 conference, the plaintiff filed a notice of withdrawal dated 6 May 2009 in which he withdrew his notice in terms of Rule 28 and his request for further particulars dated 25 March 2009.

[20] I do not intend traversing the discussions during the Rule 37 conference, as the proceedings are on record. It only remains appropriate to note that consensus was reached that three issues lay for determination by this court in respect of the divorce action :

1. The cause of the breakdown of the marriage.

2. Whether Section 5A of the Divorce Act No 70 of 1979 applied to the marriage between of the parties; and if it did, whether the court should order an annulment of the marriage or a decree of divorce. If an annulment was ordered, the court had to determine whether the defendant had suffered damages and if she had, the quantum thereof.

3. Whether the plaintiff owed the defendant the sum of R144 832.23 being monies loaned and advanced to the plaintiff by the defendant for which the defendant had instituted an action against him under case no. 4803/2007, but which also formed part of her counterclaim in the divorce action.

[21] It must be noted that although the legal principles and the validity of the aforementioned issues were not clear, the distillation of the three issues was an attempt to afford the unrepresented litigants the opportunity to ventilate the issues which, once evidence was lead and/or argument advanced by the parties, may have been clarified and found to be premised on sound legal grounds, alternatively dismissed as bad in law.

[22] The parties were urged to consider the issues that had been identified for determination before the proceedings continued and whether the issues were indeed relevant and necessary for the relief sort by the parties.

[23] It also lies to be noted that after the issues for determination were finalized, the defendant withdrew her application for consolidation under case no. 4172/2007 in respect of case no. 4803/2007, 4804/2007 and the appeal against the order of the maintenance court.

[24] At the commencement of the hearing on 19 May 2011, the previous proceedings were summarized, the parties confirmed the status of the matters that had been settled, or were not for determination before this court and placed on record that they were satisfied with the issues for determination and that the trial should proceed on that basis.

[25] It lies to be noted that during the hearing in November 2011 the defendant denied that she had agreed that the aforementioned issues were the only issues for determination. Prior to the recommencement of the hearing on the following day, I listened to the audio-record of the proceedings when the issues were decided on and was satisfied that the parties had agreed thereto. The parties were advised accordingly and the trial continued without further objection or dissent by the defendant.

<u>The divorce</u>

[26] The pleadings in the divorce action consisted of :

1 the summons dated 17 April 2007 as amended by the particulars of claim dated 27 November 2007;

2 the defendant's plea dated 12 June 2007;

3 the defendant's claim in reconvention dated 9 March 2008;

4 the plaintiff's plea to the defendant's claim in reconvention dated 27 March 2008 and his plea in the alternative also dated the 27 March 2008.

[27] The following exhibits were admitted :

Exhibit A : the Plaintiff's bundle consisting of 205 pages

Exhibit B : which consists of the marriage certificate, the anti-nuptial contract, the plaintiff's divorce order form his first marriage, the plaintiff's divorce application in respect of his previous, the defendant's divorce application in respect of her previous marriage.

Exhibit C : the defendant's bundle. This bundle was so unwieldy that it was split into parts 1 & 2. The number of pages cannot be specified because of the erratic paginating.

No disputes were raised in respect of the documents in the bundles.

I restrict the evidence in this judgment only to what is pertinent to the issues for determination.

<u>The cause of breakdown of the marriage</u>

[28] Although it is common cause that the marriage between the parties had irretrievably broken down and that there are no prospects of a restoration of a normal marriage relationship, the cause of the breakdown was in issue because the defendant disputed the plaintiff's allegations that she was the cause thereof, and contended that the plaintiff was the effective cause of the breakdown because he had misrepresented the cause of breakdown of his previous marriage to her; there was therefore a religious impediment to the marriage between them and their marriage lay to be annulled as it was a putative marriage.

[29] The plaintiff testified that the reasons for the breakdown of the marriage were as set out in the particulars of claim and that there were no prospects of restoration of a marriage relationship between the parties. He testified further that according to the Christian beliefs held by the parties there was no impediment to his marriage to the defendant when it took place. He had provided to the satisfaction of the marriage officer who conducted the legal marriage of the parties, the documents relating to the dissolution of his previous marriage on 8 January 1990. He testified that the parties had also entered into a Christian union by way of a religious ceremony to which there was also no religious bar.

[30] The defendant then proceeded to crossexamine the plaintiff, placing in dispute the breakdown of the marriage. In the course of such crossexamination, she disputed that it was her conduct that led to the breakdown of the marriage, but that their relationship had deteriorated as a result of the conduct of the plaintiff in fraudulently misrepresenting to her that his divorce from his former wife had been sanctioned by their Christian beliefs as a result of her adultery. She submitted to the plaintiff that in 2006 he unexpectedly admitted that the breakdown of his marriage was not due to his former wife's adultery, but was caused by the interference of her father; consequently the plaintiff's divorce from Diana was not valid and binding in terms of their Christian beliefs and constituted a religious impediment to their marriage. Their marriage was therefore putative and section 5A of the Divorce Act 70 of 1979 rendered an annulment appropriate relief.

[31] At this stage the court attempted to explain to the defendant that Section 5A would only apply if there was a valid marriage and that she could not seek annulment of their marriage as being void *ab initio* and claim damages and simultaneously seek an order that Section 5A applied to their marriage.

[32] The trial was then adjourned. On resumption on 16 November 2011, the defendant conceded that if the marriage that subsisted between the

parties lay to be annulled, then she could not persist with seeking relief in terms of Section 5A.

[33] The defendant also conceded that the marriage relationship had irretrievably broken down. She only persisted with the contention that the plaintiff had not been free to marry her because his divorce from Diana was not as a result of her adultery because the plaintiff had failed to depose to an affidavit or swear positively that Diana had committed adultery and had misrepresented the reason for his divorce from Diana.

[34] In response the plaintiff testified that although he did not have proof that Diana had committed adultery he was certain she had, and during their discussions she had come close to admitting her adultery. This had been sufficient to confirm her adultery and they had agreed to proceed with the divorce. He confirmed that there were also other reasons for the breakdown of their marriage, of which he had informed the defendant.

[35] The defendant then advised the court that as the plaintiff had confirmed under oath that his marriage to Diana had been dissolved as a result of her adultery she was satisfied that there had been no impediment to her marriage to the plaintiff and that she no longer persisted that the marriage was putative and lay to be annulled.
That was the case for the Plaintiff.

[36] The defendant then testified. She alleged that although it was common cause that there was an irretrievable breakdown of the marriage, it was the plaintiff who was the cause of the breakdown as he had maliciously deserted her and as she had suffered damages as a result of such malicious desertion, the plaintiff was liable to compensate her therefor.

[37] Although the defendant had agreed during the Rule 37 proceedings that the issue of damages would arise only if the court found that the marriage lay to be annulled, and the defendant subsequently conceded that the Christian marriage was valid, as there was no religious impediment as she

originally alleged, she persisted that the court had misunderstood her, she had always intended to pursue the damages sought in her plea and counterclaim, and she was entitled to a forfeiture of assets although she was married out of community without accrual in terms of the Matrimonial Property Act No 88 of 1984.

[38] When requested for authority for such a claim, the defendant relied on S2.4 of the Divorce Act, South African Family Law 2nd Ed Cronje & Heaton paragraph 7.2 at pages 96 -97; paragraph B41 of LAWSA Volume and the following 2 cases: Shanahan v Shanahan (1907) 29 NLR 15 and Voortrekker Winkels (Ko-operatief) BPK v Pretorius 1951 (1) SA 730 (T).

<u>The defendant's claim for 'Forfeiture of assets' and damages</u>

[39] When the accrual system is expressly excluded in the antenuptial contract of a marriage out of community, the parties do not have any (patrimonial) claims against each other in terms of the provisions of either the Matrimonial Property Act or the Divorce Act, regardless of the type of marriage or union. **A Practical Guide to Patrimonial Litigation in Divorce Actions Van Niekerk Lexis Nexis 13th Issue September 2011 page 1-8 & 2-2.**

[40] In terms of section 9 of the Divorce Act, a court which grants a decree of divorce has a discretion to order that the patrimonial benefits of the marriage be forfeited to the other either wholly or in part under certain circumstance. Parties married out of community of property can claim forfeiture of benefits arising upon marriage, which benefits can potentially include donations in terms of an antenuptial contract, donations made during the course of the marriage and the right to share in the accrual of the estate. In the exercise of its discretion to order forfeiture, the court will consider factors leading to the breakdown of the marriage and any substantial misconduct of the parties.

[41] The defendant has failed to specify the benefits that she alleges are to be forfeited to her. Further she has failed to prove on a balance of

probabilities that there was substantial misconduct on the part of the plaintiff. The court was faced with mutually destructive versions, and the main reason for the breakdown as alleged by the defendant, viz the plaintiff's alleged fraudulent conduct and the consequent religious impediment, proved to lack any merit.

[42] The court ruled that the defendant's reliance was misplaced and ill founded and that she had no legal basis for such claim of forfeiture. It was therefore not necessary to hear further evidence on this issue.

[43] The defendant persisted that she still had valid claims for damages against the plaintiff in her claim in reconvention, and referred the court to the documentation she relied on to support her claims. The documentation relied on is on record and it is not necessary to list them herein.

Universal partnership?

[44] From the averments in the defendant's plea and counterclaim, she appears to rely on universal partnership to ground her claim for damages against the plaintiff, although not specifically pleaded. It therefore appears appropriate to briefly consider whether she has a claim premised on universal partnership.

[45] Where a party claims universal partnership he or she must allege and prove that the contracting parties agreed to put in common all their property both future or existing (*universorum bonorum)* or that they contracted that whatever they acquire during the marriage, from any kind of commerce will be property of the partnership (*universorum quae ex quaestu venlunt)*. But prior to an examination of the averments of the party relying on universal partnership, the antenuptial contract that governs the marriage of the parties needs be examined. (**Wiid v Wiid [2011] JOL 27572 (NCK**).

[46] The antenuptial contract entered into by the parties on 9 October 1991 specifically contains the following exclusions:

‘(a) There shall be no community of property between them.

b) There shall be no community of profit and loss between them.’

[47] The aforegoing terms of the antenuptial contract do not distinguish between property existing at the time of the marriage or property acquired during the marriage whatever the cause of the acquisition. Therefore a universal partnership which contemplates an agreement that the movable and immovable properties of the parties would form assets of a partnership between them is irreconcilable with the antenuptial contract. There is therefore no proper legal basis for the defendant’s allegation that a Universal Partnership exists between the parties, nor is a claim for damages competent on the same grounds.

[48] The defendant’s claim for damages arising from the sale and mortgaging of her properties on the grounds that she relocated at the instance of the plaintiff and accessed funds to assist him and to fund their business ventures were not sustained by the documents she relied. (In any event the defendant has instituted various other actions in respect of debts incurred during their joint venture, which were separated during the Rule 37 conference as they were not incurred by the plaintiff in his personal capacity and the juristic entities are not party to this action. Only the action for monies lent and advanced was retained for hearing.)_

<u>Section 5 A of the Divorce Act 70 of 1979</u>

[49] Section 5 A provides :

> ‘It is appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the

marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.'

[50] By virtue of this section, the court is vested with a discretion as to whether it should order that the dissolution of the civil marriage be subject to a compliance with a religious or cultural practice or belief of the parties.

[51] The plaintiff contended that Section 5A was not applicable to their marriage and that the defendant was relying on a misinterpretation of their Christian beliefs and practice, as the section was only applicable to religions which prescribed specific procedures in the dissolution of a marriage entered into in accordance with that religion. As no such practice or procedure was prescribed in respect of their religious marriage, the court ought not to order him to appear before any Church tribunal. He had not followed any such practice when he divorced Diana.

[52] In response the defendant alleged that the plaintiff had himself previously relied on the existence of a Church tribunal to settle disputes which in his view ought not to be adjudicated by a court of law. When questioned why she was then relying on the court instead of the Church as the appropriate forum in respect of the disputes based on their religious beliefs, the defendant stated that it was because the plaintiff had refused to appear before any Church tribunal and she seeks an order in terms of Section 5A to compel him to attend such a hearing. In closing she submitted that if no adultery had been committed by the plaintiff at the time when he 'left the marriage' and she had not committed adultery, then the parties could not divorce. The court ought therefore not order a decree of divorce; alternatively it should order the plaintiff to attend a Church tribunal.

[53] The Divorce Amendment Act No 95 of 1996 was passed to remove the anomalies created by the discrimination between the civil marriages or legal marriages and marriages conducted in accordance with the religious beliefs of the parties.

[54] The litigants herein subscribe to the same church and accordingly should share the same religious beliefs and practices. However the court was faced with contradictory submission by the parties in respect of the applicability of Section 5A to their Christian marriage and the existence of a religious impediment to the dissolution of their marriage.

[55] Nevertheless it was apparent that the defendant was only relying on Section 5A in order to compel the plaintiff to attend a church tribunal. From the commencement of the trial she persisted that according to the religious prescripts of their church, her marriage to the plaintiff was putative because he could not marry her as his marriage to Diana could only have been dissolved on the basis of Diana's adultery. But once he testified under oath that his marriage to Diana had ended because of her adultery, the defendant was satisfied that there was no religious impediment to her marriage to the plaintiff and that her marriage was sanctioned by their Church. Yet there was no hearing or appearance before a church tribunal as she now contends that the plaintiff must attend or be ordered to by this court exercising its discretion in terms of Section 5A.

[56] This in my view establishes that there is no prescribed religious procedure which lies to be enforced in terms of Section 5A in accordance with the Christian prescripts subscribed to by the parties, either concomitantly with or before a decree of divorce in respect of the civil marriage may be ordered.

[57] I am therefore satisfied that there is no bar contemplated by Section 5A to the granting of a decree of divorce on the grounds of irretrievable breakdown.

Case No 4803

[58] Although this action was instituted by Anthea Labuschagne I shall continue to refer to the parties as they have been previously in this judgment for the purposes of consistency.

[59] This is an action by the defendant for the recovery of monies allegedly loaned and advanced by her to the plaintiff in terms of an oral agreement of loan ('the agreement') concluded between the parties at the beginning of February 2004 in Gauteng. The defendant alleges that the material express alternatively tacit alternatively implied terms of the loan were that :

1 she would make monthly payments to and behalf of the plaintiff to discharge business expenses incurred by him;
2 the amount paid would vary from month to month and on demand from the plaintiff;
3 the amounts loaned as aforesaid would be repaid when finance became available from the plaintiff's business ventures, alternatively on demand.

[60] Prior to the institution of the divorce action by the plaintiff the parties agreed in writing on 21 February 2007, 16 March 2007 and 17 March 2007 that the debt would be calculated and settled in a consent order in terms of which the parties at that time proposed to finalise their divorce. However the consent order was not finalized and the loan was not liquidated, and remains due owing and payable, as despite demand the plaintiff has refused/failed/neglected to pay the loan.

[61] According to a schedule compiled by the defendant, the loan as advanced from the beginning of February 2004 to the end of November 2006 is the sum of R144 832.23 (one hundred and forty four thousand eight hundred and thirty two rand and twenty three cents). The defendant relies further on a 'Demand' dated 26 March 2007 in which she demands payment of the aforesaid sum from the plaintiff within seven days of the date thereof.

[62] In defending the action the plaintiff denies that an oral agreement of loan was entered into by the parties or that a written agreement was subsequently entered into. He avers that this action should be considered in the light of the plea in the divorce and the action instituted by the defendant against Port Sail CC under case number 4804/2007.

[63] The parties agreed that the following pleadings were before the court in respect of this matter:

1 Summons as amended dated 14 September 2007
2 Annexure A demand dated 26 March 2007
3 Annexure B Loan account for the years 2004 – 2006
4 Plea dated 10 October 2007

The parties also agreed that they could refer to the documents in the exhibits before court.

[64] The defendant testified that she had moved to Gauteng to live with the plaintiff in December 2002 in a house which he had leased. He was employed until July 2003. For the next three months until about October 2003 he received a payment in lieu of notice of R15 000 per month. Thereafter the plaintiff concentrated on the financial planning services he offered on the internet. He charged R470 an hour for consultations he held, and debited a one percent (1%) a raising fee on successful loan applications but the business did not generate a sufficient income.

[65] The defendant raised R22 000 via an access bond on the property she owned in Hillcrest and they utilized this money between November 2003 and February 2004. In February 2004, the plaintiff was considering an offer from another company and they decided to extend their stay in Gauteng although they had decided to relocate to Richards Bay and commence a charter business.

[66] Although the plaintiff was still operating his financial planning service, he had no income. The parties then entered into oral loan agreement in terms of which it was agreed that the plaintiff would calculate monthly what he needed to meet his commitments for the rent, cellphone and other business outgoings and furnish the defendant with the sum of money he needed; she would then pay the money into his bank account. The defendant confirmed

that the payments she made in terms of this loan agreement were set out in the schedule marked 'Annexure B'. She was able to advance these loans as she had received R1.075 million from the proceeds of the sale of her Hillcrest house. She purchased a house in Mtunzini for R628 000 but sold it and bought a house in Richards Bay as the plaintiff's charter business was in Richards Bay.

[67] The commencement of the charter business was delayed until December 2005. The boat only arrived in March 2005, and from July 2004 until March 2005 they continued to utilise her money from the proceeds of the sale her property. From 1 April 2005 she worked as an estate agent and earned commission intermittently. At this stage the plaintiff required funds to refit the yacht but she was unable to assist him. He then took a loan of R149 000 from his mother. In December 2005 the charter business generated income of about R32 000 but as the business was not established the defendant continued to work during 2006 and loaned the plaintiff a further R26 024 on the same basis.

[68] The relationship between the parties ended on 14 September 2006. In February 2007 she discovered that he was in another relationship. They decided to enter into a settlement agreement which would encompass the payment of the monies owed to her in terms of the loan and other sums allegedly due to her by the plaintiff. But the defendant was not satisfied with the sums of money offered in settlement by the plaintiff and no consent order or settlement agreement was finalized.

[69] The plaintiff does not deny that the defendant made the payments as set out in the schedule. But he denies that the payments were effected in terms of an agreement of loan between the parties and that the sum claimed is payable to the defendant. He alleges that she made the payments as part of the reciprocal duty of care between the parties. He contended that he would never have entered into an oral agreement with the defendant as she had an erratic memory; further with his legal training and financial expertise, he would never enter into an oral agreement in respect of a sum in excess of

R10 000. He subsequently conceded that he had however entered into 2 oral loan agreements with the defendant when his own financial resources were low and he was unable to make unexpected payments in respect of the transport and storage of his yacht. He contended that these were the loans he had referred to when he had acknowledged that he owed the defendant money, and he had not acknowledged that he was owing the defendant money in terms of an oral loan agreement.

[70] The issue for determination is whether the defendant has discharged the onus on her to prove on a balance of probabilities that the oral loan agreement on terms as alleged by her was entered into by the parties.

[71] In discharge of the onus, the defendant testified in a detailed and credible manner and presented written documents and letters to support her testimony. Her evidence was largely unchallenged and was not undermined in crossexamination. The court was satisfied that she had the financial resources from the sale of her properties and the commission she earned to advance the loans as required by the plaintiff. Within the time frames furnished by the defendant, the plaintiff was not in regular employment or in receipt of a regular income and therefore required money to meet his lease obligations and to operate his business which was not generating a viable income. After the parties relocated from Gauteng to Kwazulu-Natal, they had to rely on her financial resources as the plaintiff's charter business only commenced at the end of December 2005.
The evidence of the defendant provides a credible factual matrix for the contention that the parties had entered into a loan agreement to assist the plaintiff with his financial constraints.

[72] The defendant effectively refuted the plaintiff's allegation that he would never enter into an oral agreement in respect of monies over R10 000 and particularly not with the defendant by proving that he had in fact done so by referring to a specific oral agreement in respect of a loan he took from her for the yacht; this compelled the plaintiff to admit that despite his denials he had entered into not one but two oral loan agreements with the defendant.

[73] The following excerpts from correspondence between the parties in Exhibit C Part A also support the defendant's allegations :

> Page 68 :email dated 13 February 2007, the plaintiff wrote :
>
> > 'Once you have figures on what I owe you, we can finalise an agreement in full and final settlement of all the financial issues between us.'
>
> Page 89 : email dated 21 February 2007, the defendant states :
>
> > 'I see that if the divorce settlement agreement is in place as agreed, by you paying me back the money you owe me as well as Port Sail CC, then the issues should be settled quickly'.
>
> Page 69 : email from plaintiff :
>
> > 'I will go through my bank statements and try and identify the loans you speak about. Better still. Itemise them or give me some figure so that I can sign an agreement for Wagtail and another to pay the loans and then we can use that as an agreement for divorce'.

[74] These excerpts are consistent with the defendant's testimony that she extracted the information in Annexure B from the plaintiff's bank statements as he had acknowledged he was owing her money and told her to compute what was owed to her. They also sustain her denial that the money the plaintiff had referred to in the correspondence, did not pertain to the charter business or loans in respect of the boat as alleged by the plaintiff. The recovery of monies allegedly due to the defendant by Port Sail CC is being pursued under another action.

[75] The defendant's allegation that although the parties had decided to divorce, the divorce did not proceed because the settlement agreement did not provide *inter alia* for the repayment of the loan, is also credible in the light of this action to recover the alleged loan in an action separate from the

divorce.

[76] The defendant also effectively illustrated by referring to the dates of the demand (26 March 2007) and the summons (17 April 2007), the fallacy of the plaintiff's allegation that the defendant did not demand the money she alleged that he owed her, until she received the divorce summons (26 April 2007); and that the court ought therefore to conclude that the loan was a fabrication by the defendant.

[77] The plaintiff on the other hand provided no credible proof or testimony. He retaliated by bluster and rhetoric which proved unfounded. He asserted that the defendant was claiming monies she had utilized in complying with the reciprocal duty of support between spouses, but does not explain why such duty extends to his business operations. His unsupported submission that the loan was a fabrication lacked credibility or merit.
In the premises I am satisfied that on a balance of probabilities, the defendant has proved the existence of the oral loan agreement between the parties and that the plaintiff owes her the money as claimed.

<u>Order :</u>

<u>Case No 4172/2007</u>

1 A decree of divorce dissolving the marriage subsisting between the parties is ordered.

2 The defendant's claim in reconvention is dismissed

<u>Case No 4803</u>

1 Judgment is granted in favour of the plaintiff (Anthea Marjorie Labuschagne) against the defendant (Izak Hermanus Labuschagne) for :

1.1 payment of the sum of R144 832.23

1.2 interest thereon at the rate of 15.5% per annum a tempora mora to date of final payment

1.3 payment of disbursements in the sum of R263.80

Murugasen J

Plaintiff:	In Person
Defendant:	In Person